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Commissioner's Office

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OFFICIAL COMMENT

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***Via Hand-Delivery***

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**Subject: LSA Document #08-764 (Antidegradation) –  
Comments Concerning the Antidegradation Standards and  
Implementation Procedures Proposed (Preliminarily Adopted)  
Rule published on December 7, 2011**

Dear Board Members:

On December 7, 2011, the Water Quality Control Board's (the "Board") Proposed Rule addressing "Antidegradation Standards and Implementation Procedures," LSA Document #08-764 (hereafter referred to as the "Antidegradation Rules" or "Rules") was published in the Indiana Register and was available for review at <http://www.in.gov/legislative/iac/20111207-IR-327080764PRA.xml.pdf>. Also on December 7, 2011, the Board published the "Fiscal Impact Statement" of the Antidegradation Rules prepared by the Indiana Department of Environmental Management ("IDEM") and available for review at <http://www.in.gov/legislative/iac/20111207-IR-327080764FIA.xml.pdf> (the "FIS"). The Indiana Water Quality Coalition ("IWQC") and the Indiana Manufacturers Association ("IMA") submit the following comments regarding the Rules and the FIS.

As we have previously stated in comments to the Board, the IWQC is a group of businesses with shared interests in Indiana regulations, policies, and operating procedures concerning water quality. The IMA is a voluntary, nonprofit trade association representing nearly 2,000 companies and 600,000 manufacturing jobs.

Each of these entities has members or facilities in Indiana that will be considerably affected by the adoption of Antidegradation Rules.

The IWQC and the IMA have previously submitted written and oral comments regarding the proposed Antidegradation Rule. Most recently, these comments were submitted verbally and in writing on July 27, 2011, regarding the Draft Rule (Final Revisions) dated May 6, 2011 (hereinafter the "July Comments"). The IWQC and the IMA hereby incorporate and refer the Board to all their prior comments, including the July Comments. The IWQC's and the IMA's additional comments are provided below.

### Comments

#### **1. IDEM's Fiscal Impact Statement does not comply with Indiana's statutory requirements.**

The Board may not adopt a rule until IDEM has published a copy of the fiscal analysis required under Indiana Code Section 4-22-2-28. IND. CODE § 13-14-9-5(a)(2)(C). In turn, Section 4-22-2-28 contains several requirements regarding the contents of "fiscal impact statements," two of which are particularly relevant here.

*First*, IDEM's fiscal impact analysis must be based on the twelve month period commencing with the date *after* the rule is fully implemented. Section 4-22-2-28 states:

[T]he agency proposing the rule shall consider the annual economic impact on all regulated persons beginning with the first twelve (12) month period after the rule is fully implemented. The agency may use actual or forecasted data and may consider the actual and anticipated effects of inflation and deflation. The agency shall describe any assumptions made and any data used in determining the total estimated economic impact of a rule under this section.

Based on this statutory requirement, IDEM's assumption regarding the number of permit applications it may expect in 2012 is inadequate. Indeed, IDEM repeatedly relies on application data purportedly representing permits it received in **2009**. (FIS at 2 ("Based upon 2009 permit applications, there are about 80 permit applications a year that may result in a new discharge of pollutants."); 3 ("Based upon the 80 permit applications received in 2009 that might be required to consider antidegradation . . . [.]"); 6 (In 2009, Indiana issued 55 new permits . . . [and]processed 89 permit modifications[.]).) IDEM then subtracts from the total number permits those that "would not likely be subject to

antidegradation review.” (FIS at 8.)<sup>1</sup> IDEM did not rely on actual data. IDEM did not rely on forecasted data. And, IDEM makes no attempt to demonstrate why 2009 data reliably predicts permit applications in 2012 or in the future. In doing so, it has not complied with Section 4-22-2-28.

The IMA and the IWQC submitted comments based on a range of historic averages for permits IDEM received from 2004 to 2009. The low-end of this range was 49 permits, while the high-end was 105 permits. IMA and IWQC maintain that this range is more accurate than relying on the IDEM's 2009 data (which IDEM then arbitrarily reduced). They submit that the high-end of the range should be used for IDEM's fiscal impact analysis as it supplies the most conservative basis on which to make a regulatory determination.

*Second*, fiscal impact statements must consider the effect that compliance with the proposed rule will have on “the state and all persons regulated by the proposed rule.” IND. CODE § 4-22-2-28(d). The IMA and IWQC read this statute to require adequate consideration of all compliance costs on all stakeholders – including the State. Inclusion of costs to the State is important. As an executive agency, all Hoosiers pay for the costs of its operations. In at least one instance, IDEM has failed to appropriately consider, and indeed has glibly set aside, potential costs to the State.

The IMA and IWQC submitted comments regarding the costs of complying with the Rules. These comments are noted in the FIS. (FIS at 3-4.) One component of these costs included a forecast that potential public notice and hearing costs could range from \$720,000 to \$945,000 per year. IDEM dismisses these numbers as being inconsistent with its experience and then, remarkably, goes on to imply that if the costs of participating in the public notice and hearings are too expensive for a regulated business, then that business may choose not to participate and the State will cover those costs. (FIS at 4 (“if they do not choose to engage in the process, IDEM will do it.”)) There is no indication in the FIS of whether IDEM has considered these additional potential costs which must be absorbed by the State. This is inconsistent with Section 4-22-2-28(d).

But, more importantly, IDEM's statement that regulated entities may “choose” not to participate in the permitting process if it becomes too expensive underscores the agency is not concerned with the potential costs of complying with the Rules. At least in part, an appropriate fiscal impact analysis must demonstrate that the true costs of a proposed rule do not exceed the regulated communities' – from small businesses to

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<sup>1</sup> IDEM's reduction of the total number of 2009 permits by those that “would not likely be subject to antidegradation review” appears to be an arbitrary reduction made to deflate the impact of complying with its proposed rule. Either a permit is subject to antidegradation review or it isn't. IDEM has the authority to make that call and it should do so here.

large corporations – ability to economically comply with the rule or to meaningfully participate in the regulatory process. If the only way members of the regulated community can comply with a proposed rule is by avoiding the costs of meaningful participation in the process, then a proposed rule is clearly too onerous and lacks legitimacy.

**2. IDEM's Fiscal Impact Statement does not adequately consider impacts on small businesses.**

In addition to the comments made above, IDEM has not given sufficient consideration to the impact of the Rules on small businesses. A "small business" is defined as a business entity with less than 150 employees. IND. CODE § 5-28-2-6. Instead of determining the true number of small businesses potentially impacted by the Rules, IDEM assumed, based on 2009 permit submissions, that "all minor permits" submitted by "industries" are "associated with small businesses." (FSI at 7.) IDEM then concludes that only 14 small businesses will be impacted by the Rules. (*Id.*) First off, IDEM has again relied on 2009 data instead of a forecast of 2012. This is inappropriate. IND. CODE § 4-22-2-28. In addition, IDEM provides no rationale for its small business calculus. It is suspect to assume that only small businesses apply for minor or general permits or the small businesses do not apply for major permits. And, it is suspect to assume that only 14 small businesses in the entire State have major permits. In any event, IDEM is required to provide some explanation and it hasn't.

Moreover, even the unsupported costs IDEM calculates would be especially onerous on small businesses in today's economic climate. IDEM predicts that costs for complying with Rules on an individual small business could range from \$4,000 to \$16,000, while the costs on all (14) small businesses would range from \$56,000 to \$224,000. This is too much.

**3. IDEM's Fiscal Impact Statement inappropriately relies on a fiscal analysis performed by the State of Iowa in 2008.**

IDEM repeatedly refers to and relies on numbers generated by Iowa when it performed its fiscal impact analysis of its antidegradation rulemaking in 2008. (FSI at 6-9.) To rely on data from 2008, especially data from another state, does not comply with Section 4-22-2-28. Moreover, IDEM's reliance on this 2008 data from Iowa has resulted in an arbitrary fiscal impact analysis based on a low \$100/hour environmental consultant fee and a \$25 one-time cost for public notice.<sup>2</sup> A fiscal impact analysis must concern

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<sup>2</sup> Similarly, IDEM does not provide a rationale for the range of hours it used to calculate costs. (FIS at 9.) Instead, it again wrongly relies on Iowa's 2008 fiscal impact analysis.

itself with the costs to Hoosiers in the future based on actual in-state costs. It does not concern itself with the predicted costs to lowans in 2008 based on costs in Iowa.

**4. IDEM has not considered the impact of the Rules on businesses making changes to water treatment additives.**

The Board may not adopt a rule until IDEM has published a copy of a "summary of the response of the department to all comments." IND. CODE § 13-14-9-5(a)(2)(B). The IMA and IWQC presented comments regarding the costs associated with changing water treatment additives at a facility. Specifically, we estimated that changing a water treatment additive would require full antidegradation review at an annual cost ranging from \$1,425,600 to \$4,050,000. While IDEM acknowledged that changing additives may result in antidegradation review, it did respond to the potential cost comments the IWA and IWQC submitted. IDEM must do so before the final rule may be adopted.

**Conclusion**

The IWQC and IMA appreciate the opportunity to provide these comments. As demonstrated above, the Antidegradation Rules should be revised to comply with Indiana's rulemaking statutes. Incorporating the IWQC and IMA's comments and suggestions set forth above will allow the Antidegradation Rules to meet these requirements.

Sincerely,



William C. Wagner